5-2700-10445-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of an Alleged Violation of the Minnesota Unfair Cigarette Sales Act by Fritz Company, Inc. in a Warning Letter Issued March 1, 1996

RECOMMENDED ORDER ON MOTIONS FOR SUMMARY DISPOSITION

This matter arises on stipulated facts and cross-motions for summary disposition together with supporting affidavits. The Motion was the subject of oral argument at the Office of Administrative Hearings on May 16, 1996, when the record closed.

The Department Staff was represented by Patrick J. Finnegan, Attorney at Law, Legal Services Unit, Department of Revenue, Mail Station 2220, St. Paul, MN 55146-2220. Respondent Fritz Company Inc. was represented by Peter J. Coyle, Attorney at Law of the firm Larkin, Hoffman, Daly and Lindgren, Ltd., 1500 Norwest Financial Center, 7900 Xerxes Avenue South, Bloomington, MN 55431-1194.

Based upon the Memoranda filed by the parties, the oral argument, all of the other filings in this case and for the reasons set out in the Memorandum which follows,

IT IS HEREBY RECOMMENDED: that the Commissioner of Revenue grant summary disposition in favor Respondent Fritz Company Inc., denying the cross-motion of Department Staff for summary disposition in its favor.

Dated this 14th day of June 1996.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

Reported: Taped, not transcribed.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. Minn. Rule pt. 1400.5500 K. Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rules of Civil Procedure, Rule 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984). In considering the Motion for Summary Disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grandahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981); American Druggists Insurance v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. 1981);

In order to obtain summary disposition, the moving party carries the burden to establish there is no genuine issue of material fact. The initial burden is on the moving party to establish a prima facie case for the absence of material facts at issue. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). When the movant also bears the burden of persuasion on the merits at trial, its burden on summary disposition is to present "credible evidence" that would entitle it to a directed verdict if not controverted at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2557, 91 L.Ed.2d 265 (1986) (dissenting opinion restating majority position); Thiele, 425 N.W.2d at 583, n. 1. When the non-moving party bears the burden of persuasion at trial, however, the moving party's burden can be met by informing the trial court of the basis for its motion and merely identifying those portions of the pleadings, depositions, answers to interrogatories, admissions or affidavits which it believes demonstrate the absence of a genuine issue of material fact. The moving party in such a case is not required to support its motion with affidavits or other similar material negating the opponent's claim and can meet its burden by merely pointing out "that there is an absence of evidence to support the non-moving party's case." Celotex Corp., 106 S. Ct. at 2553, 2554. In Celotex, the Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all the other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. [T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict

> under Federal Rule of Civil Procedure 50(a). . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 259, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

106 S. Ct. at 2511. Accord Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn. App. 1989).

Summary disposition may be entered against a party who has the burden of proof at trial if it fails to make a "sufficient showing" of the existence of an essential element of its case after adequate time to complete discovery. Carlisle, 437 N.W.2d at 715. To meet this burden of producing "sufficient" evidence, the non-moving party with the burden of proof at trial must offer "significant probative evidence" tending to support its claims. This burden is not met by a mere showing that there is some "metaphysical doubt" as to the material facts. Id. However, the non-moving party is given the benefit of the most favorable view of the evidence. Concord Co-op v. Security State Bank of Claremont, 432 N.W.2d 195, 197 (Minn. App. 1988). Also, all doubts and inferences must be resolved against the moving party. Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985).

Appellate courts have repeatedly stressed that the authority of the trier of fact to dispose of issues summarily must be exercised cautiously. Lundgren v. Eustermann, 370 N.W.2d 877 (Minn. 1985).

> In any doubt exists as to the existence of a material fact, the doubt must be resolved in favor of finding that the fact issue exists Rathbun v. WT Grant Company, 300 Minn. 223, 219 N.W.2d 641, 646 (1974). Woody v. Krueger, 374 N.W.2d 822 (Minn. App. 1985).

The trier of fact must assume the credibility of the evidence offered on summary judgment motions and deny them wherever that evidence indicates there is a material fact issue. In Howie v. Thomas for example, the Minnesota Court of Appeals held in 1994 (514 N.W.2d 822) in a paternity case that summary disposition was improper despite a blood test showing a 99.96% probability of parentage, because the putative father's denial of sexual intercourse created a fact question:

> Where the evidence is circumstantial and sustains two or more inconsistent inferences with equal weight, a directed verdict may be appropriate (because the burden of proof had not been sustained and a contrary verdict would be based on speculation), but a summary judgment would not be.

See also, Doe v. Brainerd International Raceway, Inc., 514 N.W.2d 811 (Minn. App. 1994).

The function of the trier of fact in deciding a Motion for Summary Disposition is never to weigh the evidence in an attempt to determine what the facts are. Wagner v. Schwegmann's South Town Liquor, Inc., 485 N.W.2d 730 (Minn. App. 1992). Once the non-moving party introduces evidence showing that there is a material fact issue, the inquiry is over and the motion must be denied, without engaging in fact finding.

The Minnesota Court of Appeals has called summary judgment a "blunt instrument" which should only be employed when it is perfectly clear that no issue of fact is involved. Home Mutual Insurance Company v. Snyder, 356 N.W.2d 780 (1984). The Minnesota Supreme Court has cautioned that the motion should be denied even where the evidence leads one to suspect that it is unlikely that the non-moving party will prevail upon trial. Whisler v. Findeisen, 280 Minn. 454, 160 N.W.2d 153 (1968):

> That fact is not a sufficient basis for refusing Defendant his day in court with respect to issues which are not shown to be sham, frivolous, or so insubstantial that it would obviously be futile to try them. Sprague v. Vogt (8 Cir) 150 F.2d 795; Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711; Clark, The Summary Judgment, 36 Minn. L.Rev. 567; 10 Dunnell, Dig. (3 ed.) section 4988 b; Annotation, 48 A.L.R. (2d) 1188; Rakeness v. Swift and Company, 275 Minn. 451, 147 N.W.2d 567.

Respondent is a 56 year old, family-owned Minnesota distributor and wholesaler of a wide variety of groceries and convenience store merchandise, including tobacco products. The company readily concedes that it cannot sell its goods at prices lower than the dominant national wholesale chains, such as SuperValu and SuperAmerica, who can command volume discounts on their massive inventories. Respondent's continued survival in this line of business hinges on the level of service it provides to its customers, including assistance with inventory management and credit. The credit assistance is provided to worthy retailers (roughly 50% of the customers) who qualify for Respondent's "Fritz Prompt Payment Plan."

The legality of this credit program has been challenged in a past proceeding by the Revenue Department, because it applies to all of the merchandise Respondent distributes, including cigarettes. The Department of Revenue is charged with enforcement of Minnesota's Unfair Cigarette Sales Act (UCSA) which prevents wholesalers from giving their customers a "discount" or "a concession of any kind in connection with the sale of cigarettes."

The Department contended in that past proceeding (52-2700-8705-2; June 6, 1994; Judge Frankman) that Respondent's credit plan violated the UCSA because the customer invoices did not explicitly disclose, on the face of those documents, what the amount of the late penalty would be if the customer failed to comply with the extended credit terms. The ALJ agreed with this contention, sustaining a summary disposition motion in favor of the Department Staff.

However, the Judge also made it clear in her memorandum that a bona fide, properly disclosed penalty program, equally applicable to tobacco and non-tobacco products, without concealed terms or fictitious pricing, would fully comply with the letter and spirit of the UCSA, specifically Minn. Stat. §§ 325D.33, subd. 3 and 325D.38. Her memorandum setting forth and explaining the applicable legal reasoning stressed staff concurrence with this conclusion, "the Department has conceded that it would have no problem with a properly identified late payment penalty."

The Commissioner of Revenue subsequently issued an order on June 24, 1994 adopting Judge Frankman's recommended order and incorporated memorandum "as

set forth in the attached order on motion for Summary Disposition." The Commissioner's order did not contain any qualifying memorandum or any indication of any other disagreement of any kind regarding the substance of the decision.

Respondent relied upon the decision in that case in totally revamping its credit program. It revised its invoices to explicitly detail the costs which are the basis for the penalties for late payment for every transaction with each customer, item by item. It executed new individual contracts with eligible retailers detailing the operation of the plan and confirming understanding of the invoiced prices involved, in writing, signed by each proprietor.

In February of 1996, three department staff auditors, conducting a review of Respondent's tobacco product tax returns, decided that payments made to retailers under the plan appeared to them to constitute "rebates or concessions in connection with the sale of cigarettes." They issued a formal warning letter on March 1, 1996, which was duly objected to by the Respondent, leading to the cross-motions for summary dispositions considered herein.

Department Staff has the burden of proving that the refunds of late payment penalties which Respondent made under its "Prompt Payment Plan" were really disguised rebates or discounts for cigarette sales, prohibited by the UCSA. In an effort to establish the prima facie case for its assertion that there is no fact issue regarding the validity of Respondent's practices, requisite to granting its summary disposition motion, Staff filed accounts payable registers, sales allowance schedules and invoices from four retail customer accounts for March of 1995.

Careful analysis of these filings suggests the contrary conclusion, that the credit arrangement is a bona fide, above-board service offered only to Respondent's credit worthy clients, that is equally applicable to cigarette and non-cigarette products alike. There is no indication of any kind in the documentation of fictitious prices or concealed discounts or rebates related particularly to cigarettes.

On the contrary, the retailer that was allotted the highest percentage credit for prompt payment (4%) bought no cigarettes at all from Respondent that month. The $67.21 credit incentive received by this Pelican Rapids grocery store was based entirely on sales of non-cigarette merchandise. Moreover, the retailer who purchased the most cigarettes percentage wise (roughly 95% of its monthly deliveries) a St. Paul liquor store, was allotted the lowest credit for expeditious settlement of accounts (2%). An intermediate percentage allotment (3%) was paid to a pharmacy in Newport, where cigarette purchases made up roughly two-thirds of the monthly purchases.

Indeed, if this evidence proffered by the Staff supports any correlation between payments and cigarette purchases, it would be that payment rates decrease as the proportion of cigarette purchases increase. In fairness, this is doubtless a statistical quirk and the correlation is purely coincidental. The payment rates are actually probably based on the credit worthiness of the particular customers, as Respondent asserts in its affidavits.

Staff has not specifically disputed that assertion, but has not stipulated to its veracity. If Respondent's motion for summary disposition is not granted, it would be called upon to prove this relationship between rates and credit worthiness, which could be a lengthy and expensive proposition.

As discussed above, the question to be answered in response to Respondent's summary disposition motion is whether there is a genuine fact issue here which Respondent must legally be brought to the bar to litigate. Based upon this record, that question must be answered in the negative. The evidence introduced by the staff does not establish a prima facie case for the existence of a material factual issue regarding the bona fides of the operation of Respondent's credit program.

On the other hand, Respondent has clearly established, in its affidavits and other documentation, a prima facie case for its contention that the program complies with the UCSA as interpreted in past proceedings. The evidence submitted by the Staff, as discussed above, viewed in a light most favorable to it as the non-moving party, corroborates Respondent's evidence, rather than contradicting it. Respondent's motion for summary disposition must accordingly be granted.

HLK